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In the Supreme Court of the United States

OCTOBER TERM, 1967

No. 580

TENNESSEE PACKERS, INC., FROSTY MORN DIVISION,
PETITIONER

v.

NATIONAL LABOR RELATIONS BOARD

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 12a-29a) is reported at 379 F. 2d 172. The findings of fact, conclusions of law and order of the Board (Pet. App. 31a-45a) are reported at 154 NLRB 819.

JURISDICTION

The judgment of the court of appeals was entered on June 21, 1967 (Pet. App. 30a). The petition for

a writ of certiorari was filed on September 6, 1967. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATUTE AND REGULATIONS INVOLVED

The pertinent provisions of the National Labor Relations Act, as amended, 61 Stat. 136, 73 Stat. 519, (29 U.S.C. 151 *et seq.*), and of the Board's Rules and Regulations are set forth at pp. 3-8 of the petition.

QUESTIONS PRESENTED

1. Whether the National Labor Relations Board may set aside a representation election on the basis of employer conduct which, though not alleged by the union in its objections to the election, was discovered in the course of investigating the objections and was related thereto.

2. Whether the Board may refuse to allow relitigation in an unfair labor practice proceeding of issues determined upon an administrative investigation in a related representation proceeding.

STATEMENT

After losing a Board election on September 28, 1963, the Union,[1] pursuant to Section 102.69(a) of the Board's Rules and Regulations (Pet. 5-6), filed timely objections, alleging employer conduct affecting

[1] Amalgamated Meat Cutters and Butcher Workmen of North America, AFL-CIO, Local No. 405.

the election results. The Union alleged, *inter alia*, that (B.A. 130a):[2]

> 4. Employees were called together for a so-called "safety meeting" and at this time were told by management officials to sign a petition stating that they did not want a union.

The Regional Director conducted an investigation and found that approximately three weeks before the election a "spokesman" for petitioner's truck drivers complained to Plant Superintendent Barnes that some drivers were deliberately missing runs. Upon the drivers' suggestion, Barnes appointed a committee of drivers to draft written rules for his approval. Subsequently, the committee prepared a document which provided, *inter alia*, that drivers who missed runs without adequate cause would be penalized (B.A. 148a; 140a-141a). These rules were presented to management, approved by a vote of the drivers about two weeks before the election, and adopted by Barnes (B.A. 136a-137a, 148a).[3] On these facts, the Regional Director found that petitioner had granted a benefit to its employees while an election proceeding was pending, and recommended that the election be set aside (B.A. 137a-138a).

Petitioner filed exceptions to the Regional Director's report pursuant to Section 102.69(c) of the Board's

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[2] "B.A." refers to the Board's Appendix filed in the court of appeals.

[3] The Regional Director's findings were in large part based upon Barnes' affidavit.

Rules and Regulations (29 C.F.R. 102.69(c)). In its exceptions petitioner asserted (B.A. 142a-143a):

> In the report sustaining Objection 4, the Regional Director reconstructs the Objection, making it have an entirely different meaning. * * * Employer respectfully insists that the finding in the Report that the rules adopted by the truck drivers of Employer, and approved by Management "effect a change in working conditions" is a conclusion based on no facts disclosed by the Report * * *. There is no showing that Management granted "improved working conditions to the drivers" or that Management was dealing directly with employees and granting benefits in the course of a union's organizing campaign, and thus interfered with an election.

Petitioner also contended (B.A. 143a-144a) that the Regional Director's finding that "the transaction" upon which Objection 4 (see *supra*, p. 3), was based occurred "approximately three weeks before the election," and thus after the filing of the election petition, "is highly speculative" (B.A. 143a-144a).[4] Petitioner did not request a hearing.

The Board, adopting the Regional Director's factual findings, held that, since the verbal rules previously in effect were unclear, the drivers who had not been deliberately missing runs could reasonably have believed that the new written rules would bring a

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[4] The Board will not consider pre-election conduct occurring prior to the filing of an election petition in determining whether to set aside the election. See *Goodyear Tire & Rubber Co.*, 138 NLRB 453. Here the petition was filed on August 26, 1963, more than a month before the election (B.A. 131a, n. 1).

greater measure of fairness to the method of assigning routes. Thus, the written rules afforded many of the drivers a substantial benefit at a time just before the election. Noting that petitioner had not explained why the changes could not have been deferred until after the election, the Board concluded that petitioner's conduct interfered with employee free choice. It set the election aside and directed a new one (B.A. 148a-149a).

The Union won the second election, and, after a hearing upon petitioner's challenges to certain ballots, the Board certified the Union as the employees' collective bargaining representative (B.A. 173a-182a). Upon petitioner's refusal to bargain, an unfair labor practice complaint was issued by the Board's General Counsel, who, after petitioner had filed an answer, moved for summary judgment on the pleadings (B.A. 182a-189a).

On June 10, 1965, the Trial Examiner granted the General Counsel's motion for judgment on the pleadings, found that petitioner had unlawfully refused to bargain with the Union, and recommended that a conventional bargaining order issue (Pet. App. 32a-45a). The Board adopted the Examiner's recommendation (Pet. App. 31a-32a), and entered an appropriate order against petitioner (Pet. App. 32a, 43a-45a).

Upon petition by the Board for enforcement of its order, the court of appeals rejected petitioner's contention that the Regional Director acted unlawfully in setting aside the election on the basis of facts not specifically alleged in the Union's objections (Pet.

App. 22a). The court also rejected petitioner's contention that it should have been afforded an opportunity in the unfair labor practice proceeding to relitigate its claim that the Regional Director erred in setting aside the first election (Pet. App. 22a-23a). Accordingly, the court sustained the Board's refusal to bargain finding and enforced its bargaining order (Pet. App. 29a).

ARGUMENT

1. The court below was clearly correct in concluding that, in the circumstances of this case, the Board could properly set aside the first election because of the employer's action in improving working rules just prior to the election, even though such change was not specifically alleged in the Union's objections to the election. An election proceeding "is not technical. It is an 'investigation,' essentially informal, not adversary. The investigation is not required to take any particular form * * *." *Inland Empire District Council* v. *Millis*, 325 U.S. 697, 706. And it is settled that "Congress has entrusted the Board with a wide degree of discretion in establishing the procedure and safeguards necessary to insure the fair and free choice of bargaining representatives by employees." *National Labor Relations Board* v. *A. J. Tower Co.*, 329 U.S. 324, 330. In recognition of the nature of representation proceedings and the fact that challenges and objections are often filed by non-lawyers and must be filed quickly,[5] the Board has consistently

[5] Objections must be filed within five days after the tally of ballots, and ballots must be challenged at the election. See 29 C.F.R. 102.69(a) (Pet. 6).

held that it is not limited to the precise allegations made by the parties, but may resolve objections and challenges on the basis of all the facts obtained in its post-election investigation.[6] Nor is this practice contrary to the provision of the Board's rules (29 CFR 102.69(a) (Pet. 6)) stating that objections "shall contain a short statement of the reasons therefor"; the principal purpose of this requirement is to obviate the necessity for the Board to investigate contentions which on their face would not warrant setting an election aside—not to limit the scope of the Board's inquiry. See *Atlantic Mills Servicing Corp.*, 120 NLRB 1284, 1287.

Petitioner was not prejudiced by the Board's approach in the instant case. Although the Union's objection did not specifically raise the issue of the change in working rules, it did refer to a "safety meeting" between the employees and management officials (*supra*, p. 3). This reference put petitioner on notice that that meeting, as a result of which the change in rules occurred, would be a subject of investigation by the Regional Director. Moreover, when the investigation revealed that it was petitioner's change in working rules, and not its instigation of an anti-union petition, which constituted a questionable practice, petitioner was so advised and afforded an opportunity, which was accepted, to submit affidavits to the Regional Director respecting that mat-

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[6] See, *e.g.*, *Hobart Manufacturing Co.*, 92 NLRB 203; *Lockwood-Dutchess, Inc.*, 106 NLRB 1089; *Carter-Lee Lumber Co.*, 119 NLRB 1374; *Custom Molders of P.R.*, 121 NLRB 1007; *Lake Catherine Footwear, Inc.*, 133 NLRB 443, 445, n. 1 (citing other cases).

ter (B.A. 137a, 140a-141a, 142a).[7] Finally, after the Regional Director issued his report on the objections, petitioner was afforded an opportunity to file exceptions with the Board, and did so (B.A. 141a-145a).

In these circumstances, the decision of the court below sustaining the Board's action in setting aside the first election in this case presents no issue warranting review by this Court. See also *National Labor Relations Board* v. *Dal-Tex Optical Co.*, 310 F. 2d 58, 61-62 and n. 2 (C.A. 5).

2. The ruling of the court below sustaining the Board's refusal to allow relitigation in the unfair labor practice proceeding of petitioner's objections to the setting aside of the first election likewise involves no issue justifying further review. The statute itself does not require a post-election hearing. But the Board's Rules and Regulations do provide that, where the Regional Director's investigation or the parties' exceptions disclose "substantial and material" issues of fact, such issues may be set down for hearing. See 29 C.F.R. 102.69(c), 102.69(e).[8] That approach has a sensible purpose—"to avoid lengthy and protracted proceedings, and eliminate unnecessary de-

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[7] Compare *International Ladies' Garment Workers' Union* v. *National Labor Relations Board*, 339 F.2d 116, 124-125 (C.A. 2), where the court found that the opposing party was not afforded an opportunity to meet the new ground discovered by the Regional Director.

[8] Indeed, petitioner did not request a hearing in its exceptions to the Regional Director's report respecting the first election (see Pet. 17a-18a).

lays in certifying the results of an election" (Pet. App. 20a). Not only is it established that, absent such material issues of fact, the Board may resolve post-election controversies without a hearing. It is likewise settled that, in the absence of newly discovered evidence, the Board need not reconsider such matters in a subsequent, related unfair labor practice proceeding. See *National Labor Relations Board* v. *Sun Drug Co.*, 359 F.2d 408, 414-416 (C.A. 3); *Neuhoff Brothers, Packers, Inc.* v. *National Labor Relations Board*, 362 F. 2d 611, 613 (C.A. 5), certiorari denied, 386 U.S. 956; *Macomb Pottery Co.* v. *National Labor Relations Board*, 376 F. 2d 450, 452 (C.A. 7); *National Labor Relations Board* v. *Lawrence Typographical Union No. 570*, 376 F. 2d 643, 651-652 (C.A. 10). See also *Pittsburgh Plate Glass Co.* v. *National Labor Relations Board*, 313 U.S. 146, 158, 161-162.[9] As the opinion of the court below makes plain, no "substantial and material factual issues" were raised in the earlier representation proceeding (Pet. App. 20a-22a).[10] Thus, as that court properly concluded, there

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[9] Nor can *Pittsburgh Plate Glass* properly be distinguished on the ground that in that case, unlike here, there was a hearing in the representation proceeding (see Pet. 10-11). A hearing was held in *Pittsburgh Plate Glass* because substantial issues of fact were presented; had petitioner presented such issues, it could have obtained a hearing here.

[10] As pointed out by the court below, in order to raise such issues "it is necessary for a party to do more than question the interpretation and inferences placed upon the facts by the Regional Director"; "* * * the party seeking a hear-

was no need for a hearing in that proceeding, nor for reconsideration of the matters there resolved in the latter proceeding (Pet. App. 22a-23a).

CONCLUSION

For the reasons stated, the petition for a writ of certiorari should be denied.

Respectfully submitted.

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ing [must] clearly demonstrate that factual issues exist which can only be resolved by an evidentiary hearing" (Pet. App. 19a).

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